BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARGARITO RIVAS	)	
Claimant	)	
	)	
VS.	)	
	)	
RICKERT INDUSTRIAL COATINGS	)	
Respondent	)	Docket No. **1,007,167**
	)	
AND	)	
	)	
KS. EMPLOYERS WORK COMP FUND	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the May 13, 2011 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on August 19, 2011. Gary R. Terrill, Overland Park, Kansas, was appointed as a Pro Tem in this matter.

APPEARANCES

Thomas M. Warner, Jr., of Wichita, Kansas, appeared for the claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed that claimant suffered a work-related injury to his back on August 17, 2002. The application for hearing was filed on November 1, 2002. The authorized treating physician released claimant at maximum medical improvement on December 11, 2002. But the regular hearing was not held until November 3, 2010. The nature and extent of disability was disputed and respondent argued that the claim should

be dismissed pursuant to K.S.A. 44-523(f) because the matter had not proceeded to hearing within 5 years from the date the application for hearing was filed.

The Administrative Law Judge (ALJ) concluded that this claim was not barred by K.S.A. 44-523(f) and further determined claimant suffered an 80 percent work disability based upon a 100 percent wage loss and a 60 percent task loss.

Respondent requests review and argues claimant is not entitled to an award of compensation because this claim should be dismissed pursuant to K.S.A. 44-523(f) as the hearing was not held within 5 years from the date the application for hearing was filed. Respondent notes that claimant's 5-year period did not expire until November 6, 2007. Consequently, claimant had over a year, after the amendment of K.S.A. 44-523(f) which was effective July 1, 2006, to schedule his case for a regular hearing or request an extension of time pursuant to the amended statute. In the alternative, respondent argues that if claimant is awarded a work disability it should be no more than 67 percent based on his 100 percent wage loss and the 34 percent task loss opinion from the treating physician.

Claimant requests the Board to affirm the ALJ's Award. Claimant argues that the Workers Compensation Act (Act) did not have a time limit for a claim to proceed to regular hearing until K.S.A. 44-523 was amended by adding subsection (f) effective July 1, 2006. Consequently, claimant argues the law in effect on the date of accident controls and when this accident occurred there was no statutory provision to dismiss a claim for lack of prosecution. Claimant further argues the statutory change was substantive and thus only applicable to accidents occurring on or after July 1, 2006.

The issues for Board review are whether the claim should be dismissed pursuant to K.S.A. 44-523(f) and, if not, the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On August 17, 2002, claimant was injured while performing his job duties for respondent. Claimant was lifting sacks of sand weighing approximately 100 pounds and experienced low back pain radiating down into both legs as well as a tear in his groin area which was later diagnosed as a hernia. An MRI performed on September 5, 2002, revealed degenerative disk disease and a defused disk bulge at L4-5 with no nerve impingement.

On September 6, 2002, claimant underwent surgery to repair the right inguinal hernia. In October 2002 claimant saw Dr. Eyster for his back complaints and physical

therapy was recommended. And claimant also received an epidural steroid injection which did not provide any relief. Claimant was then referred to Dr. John Estivo for treatment.

Claimant met with Dr. Estivo on October 23, 2002, and reported pain in his low back that radiated into both of his lower extremities. Upon examination, Dr. Estivo diagnosed claimant with a lumbar strain with degenerative disk disease at L4-5. He recommended that claimant have a second epidural injection to the lumbar spine and recommended physical therapy 3 times a week for a month for strengthening and range of motion exercises for the lumbar spine. Dr. Estivo assigned temporary restrictions of lifting no more than 20 pounds and limit bending, twisting and stooping to no more than 1/3 of a full workday.

Dr. Estivo next saw claimant on November 14, 2002. Claimant continued to have pain in the lumbar spine and pain in both legs. Claimant reported that the pain in the right leg went as far as the knee and the pain in the left leg went all the way down to his ankle. He also reported numbness and tingling in both lower extremities. Dr. Estivo opined that the claimant had lumbar spine strain with bulging disk at L4-5. He recommended that the claimant have a myelogram CT scan of the lumbar spine to investigate the pain radiating down the left leg and prescribed something to help him sleep and told claimant to continue with his temporary restrictions.

Dr. Estivo saw claimant again on December 11, 2002. Dr. Estivo noted that the results of the myelogram CT scan of the lumbar spine were normal and claimant's pain was contained in the lumbar spine. Dr. Estivo examined claimant and opined that based on his findings claimant was at maximum medical improvement. Claimant was assigned permanent restrictions of no lifting more than 40 pounds. Dr. Estivo opined claimant had a 5 percent impairment to the lumbar spine for lumbar strain pursuant to DRE Category II of the AMA *Guides*[1]. Dr. Estivo reviewed the task list of Karen Terrill and opined that out of 35 non-duplicated tasks, claimant could no longer perform 12 for a 34 percent task loss.

Dr. Pedro Murati performed an examination of claimant on January 22, 2003. Claimant complained of low back pain radiating down the left leg with numbness in the toes. Claimant reported that sitting, walking and standing increased his low back pain. Dr. Murati diagnosed claimant with low back pain secondary to radiculopathy and left SI joint dysfunction. Dr. Murati concluded that claimant's diagnosis was within all reasonable medical probability a direct result from the August 17, 2002 work-related injury during claimant's employment with respondent.

Dr. Murati assigned the following permanent restrictions within an 8-hour workday: no crawling, no lifting, carrying, pushing or pulling over 35 pounds, occasionally 35 pounds,

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

frequently 20 pounds, 10 pounds constantly, rarely bend, crouch and stoop, occasionally sit, stand, walk, climb stairs and ladders, squat and drive, and alternate sitting standing and walking. Dr. Murati rated claimant with a 10 percent whole person impairment for low back pain secondary to radiculopathy pursuant to Lumbosacral DRE Category III of the AMA *Guides*. Dr. Murati reviewed the task list of Karen Terrill and opined that out of 35 non-duplicated tasks, claimant could no longer perform 21 for a 60 percent task loss.

Claimant met with Karen Terrill for a vocational assessment on February 3, 2010. Ms. Terrill reported that claimant has not worked since the accident. Ms. Terrill compiled a list of 35 unduplicated tasks claimant performed in the 15 years before his accidental injury.

Initially, respondent argues that this claim should be dismissed for lack of prosecution pursuant to K.S.A. 44-523(f). Specifically, the claim did not proceed to regular hearing (final hearing) within 5 years of filing the application for hearing.

The Kansas Legislature amended K.S.A. 44-523 effective July 1, 2006, by adding subsection (f) which provides:

> Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

In *Bryant*[2], the Kansas Supreme Court recently restated the general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively. The general rule is especially applicable when the amendment to an existing statute creates a new liability not existing before or changes the substantive rights of the parties.[3] Moreover, it is an axiom of workers compensation law that the substantive rights between the parties are determined by the law in effect on the date of injury.[4]

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[2] *Bryant v. Midwest Staff Solutions, Inc.*,___ Kan. ___, 257 P.3d 255 (2011).

[3] *Halley v. Barnabe*, 271 Kan. 652, 24 P.3d 140 (2001).

[4] *Lyon v. Wilson,* 201 Kan. 768, 443 P.2d 314 (1968).

Claimant's accidental injury occurred on August 17, 2002. He filed his application for hearing on November 6, 2002. The regular hearing (final hearing) was held on November 3, 2010. And the amendment to K.S.A. 44-523(f) was effective July 1, 2006.

In *Halley*[5] the Kansas Supreme Court stated:

> On the question of the retrospective application of a statute, we have said:
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> 'The general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively. This rule is normally applied when an amendment to an existing statute or a new statute is enacted which creates a new liability not existing before under the law or which changes the substantive rights of the parties.'
> 'The general rule of statutory construction is modified where the statutory change is merely procedural or remedial in nature and does not prejudicially affect the substantive rights of the parties.'
>
> 'While generally statutes will not be construed to give them retrospective application unless it appears that such was the legislative intent, nevertheless when a change of law merely affects the remedy or law of procedure, all rights of action will be enforced under the new procedure without regard to whether or not the suit has been instituted, unless there is a savings clause as to existing litigation.'[6]

In *Lyon*[7], the Kansas Supreme Court stated:

> The liability of an employer to an injured employee arises out of contract between them, and the terms of a statute are embodied in that contract. The injured employee must therefore recover on the contract, and his cause of action accrues on the date of the injury. The substantive rights between the parties are determined by the law in effect on the date of injury. Amendments to the compensation act which are merely procedural or remedial in nature, and which do not prejudicially affect substantive rights of the parties, apply to pending cases. The general rule, however, is that a statute will operate prospectively rather than retrospectively, unless its language clearly indicates that the legislature intended the latter, and that retrospective application will not be given where vested rights will be impaired.

Prior to July 1, 2006, K.S.A. 44-523 did not have a subsection (f), and there was no requirement that a regular hearing be held within 5 years after a worker files his or her

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[5] *Halley v. Barnabe*, 271 Kan. at 657.

[6] *Id.* at 657-58, quoting *Davis v. Hughes*, 229 Kan. 91, 101, 622 P.2d 641 (1981), and *Nitchals v. Williams*, 225 Kan. 285, Syl. ¶ 1-3, 590 P.2d 582 (1991); see also *Ripley v. Tolbert*, 260 Kan. 491, 921 P.2d 1210 (1996); *Lakeview Village v. Board of Johnson County Comm'rs*, 232 Kan. 711, 659 P.2d 187 (1983).

[7] *Lyon v. Wilson*, 201 Kan. 768, 774, 443 P.2d 314 (1968).

application for hearing. Nor did the Act contain any statutory provision allowing dismissal of a claim for lack of prosecution. The amendment to K.S.A. 44-523 with the addition of subsection (f) does not contain any language that clearly indicates it will be given retrospective application. If K.S.A. 44-523(f) were applied to this matter, it would have the effect of dismissing the claim. Thus, if K.S.A. 44-523(f) were applied here, claimant's vested right to pursue his claim would be abrogated.

The statutory amendment should be applied prospectively and accord all claims the same 5-year period before they are subject to dismissal. Because the substantive rights of the parties to a workers compensation claim are determined by the law in effect on the date of injury the amendment to the statute applies to accidents that occur on or after its effective date.

The respondent adopts the argument of the dissent in the Board decision in *Peters*[8] which argued that the test to be applied is one of reasonableness. The dissent asserted that the 5-year statute of limitations should retrospectively apply where a claimant has a reasonable time after K.S.A. 44-523(f) was enacted to take the claim to regular hearing, but fails to do so. But K.S.A. 44-523(f) does not contain a provision regarding a reasonable time to comply, instead it simply provides a 5-year statute of limitations. And as noted in *Bergstrom*[9], courts must give effect to a statute's express language rather than determine what the law should or should not be. Nor should a court add something not readily found in the statute.

This Board has consistently determined that K.S.A. 44-523(f) will not be retrospectively applied.[10] Reversing this line of cases would be inconsistent and unreasonable, and would have the effect of impairing the vested rights of those claimants who have relied on past Board decisions on this issue. Therefore, the Board finds K.S.A. 44-523(f) will not be retrospectively applied to the current claim.

Respondent next argues that the ALJ erred in failing to consider the task loss opinion provided by the treating physician.

Both Drs. Estivo and Murati provided functional impairment ratings for claimant's low back injury. The injury to claimant's low back is not an injury addressed in the schedule of K.S.A. 44-510d. Accordingly, claimant's permanent partial general disability benefits are

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[8] *Peters v. City of Overland Park*, No. 268,461 2007 WL 2296117 (Kan. WCAB Jul. 31, 2007).

[9] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[10] *Powe v. Venator Group,* No. 258,968, 2007 WL 2296115 (Kan. WCAB July 31, 2007); *Peters v. City of Overland Park,* No. 268,461, 2007 WL 2291667 (Kan. WCAB July 31, 2007); *Salama v. Hen House Market,* No. 1,009,525, 2008 WL 2673163 (Kan. WCAB June 30, 2008); *Randel v. Leroy Perry d/b/a Perry Const.*, No. 251,165, 2008 WL 3280288 (Kan. WCAB July 31, 2008).

governed by K.S.A. 44-510e, which requires claimant's wage loss to be averaged with his task loss.

In *Bergstrom*[11], the Kansas Supreme Court interpreted K.S.A. 44-510e, which governs the computation of claimant's permanent partial general disability, and ruled that it is not proper to impute a post-injury wage when computing the wage loss in the permanent partial general disability formula. The Kansas Supreme Court stated, in pertinent part:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[12]
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> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.[13]
>
> We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee "*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.[14]

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[11] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[12] *Id.*, Syl. ¶ 1.

[13] *Id.* Syl. ¶ 3.

[14] *Id.* at 609-610.

In the absence of *Bergstrom*, the reasons for claimant's lack of employment would have been an issue for the Board to consider in determining whether claimant's actual post-injury wages or his wage-earning ability should be used in computing his permanent partial general disability under K.S.A. 44-510e. But *Bergstrom* makes clear that good faith is not an element of the permanent partial general disability formula and those earlier Kansas Court of Appeals cases that treated good faith as an element of the formula are no longer valid. Consequently, claimant's actual post-injury earnings must be used in computing his permanent partial general disability. And the difference in claimant's pre- and post-injury wages is 100 percent. And that is claimant's wage loss for the permanent partial general disability formula.

Dr. Murati provided a task loss opinion of 60 percent utilizing the task list prepared by Ms. Terrill. Conversely, Dr. Estivo provided a task loss opinion of 34 percent utilizing the task list prepared by Ms. Terrill. The ALJ adopted the task loss opinion from Dr. Murati without explanation and without any reference to Dr. Estivo's opinion. Other than listing Dr. Estivo's deposition as part of the record, there is no further reference to the doctor in the Award. Upon review of the entire evidentiary record, the Board finds that neither doctor's opinion is more persuasive and, therefore, each should be given equal weight. The Board finds that claimant's loss of task performing ability is 47 percent. And averaging a 47 percent task loss with a 100 percent wage loss results in a 73.5 percent work disability. Consequently, the Board modifies the ALJ's Award to reflect claimant has suffered a 73.5 percent work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[15] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated May 13, 2011, is modified to award claimant compensation for a 73.5 percent work disability.

Claimant is entitled to 16 weeks of temporary total disability compensation at the rate of $311.68 per week or $4,986.88 followed by 304.29 weeks of permanent partial disability compensation at the rate of $311.68 per week or $94,841.11 for a 73.5 percent work disability, making a total award of $99,827.99 which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

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[15] K.S.A. 2009 Supp. 44-555c(k).

Dated this _____ day of September, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Thomas M. Warner, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge